

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX - REAL ESTATE EXCHANGE, INC.,

Plaintiff,

v.

ZILLOW, INC., et al.,

Defendants.

Case No. 2:21-CV-00312-TSZ

**JOINT STATUS REPORT PURSUANT
TO JULY 28TH HEARING**

Plaintiff REX - Real Estate Exchange, Inc. (“REX”) and Defendants Zillow Inc., Zillow Group, Inc., Zillow Homes, Inc., Zillow Listing Services, Inc., and Trulia, LLC (collectively, “Zillow”), by and through their attorneys, respectfully submit this joint status report as ordered by the Court at the parties’ July 28, 2023 hearing (see Minute Order dated 7/31/2023).

I. REMOTE JURY SELECTION

The parties agree that jury selection in this matter may proceed remotely.

II. IMPACT OF HOLIDAYS ON TRIAL SCHEDULE

The parties recognize that certain religious holidays overlap with the current trial schedule; most notably, Yom Kippur begins the evening of Sunday, September 24, 2023 and ends the evening of Monday, September 25, 2023. The parties respectfully request that no

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1 trial be held on Monday, September 25, so that any persons involved in the trial—which may
2 include jurors—be allowed to observe the holiday.

3 **III. OTHER ISSUES**

4 **A. September 8, 2023 Pretrial Conference**

5 The parties request that the pretrial conference occur via Zoom.

6 **B. Scope Of Trial & Request for Status Conference**

7 Zillow's Position: Given the Court's summary judgment ruling on August 16, a vast
8 number of the more than 1,600 exhibits, 21 witnesses, and 3,000 pages of designated
9 deposition testimony that REX has identified in its pretrial statement are likely irrelevant.
10 Zillow has met and conferred with REX, asking REX to narrow the scope of its case, but the
11 parties have not yet reached agreement. Accordingly, Zillow seeks a status conference for the
12 parties and the Court to discuss, among other things, how REX intends to reasonably approach
13 its evidentiary presentation following dismissal of its antitrust claims, as well as the scheduling
14 of trial days in terms of what days of the week trial will occur, and how long trial will last each
15 day such that REX and Zillow are aware of their respective trial clocks and can make trial
16 preparations accordingly.

17 REX's Position: The summary judgment order narrows the claims and issues that the
18 jury will be required to decide to determine liability. However, as to damages, REX claims
19 that it is entitled to recover the present value of its lost profits, which is the same as the
20 enterprise value of the business, because it was driven out of business as a proximate result of
21 Zillow's violation of the Lanham Act. REX also claims enhanced damages and attorney's fees
22 based on the exceptional nature of the case pursuant to the Lanham Act. Therefore, REX's
23 damages-related evidence consists of essentially the same testimony and documents on which
24 it would have relied had the antitrust claims not been dismissed. That being said, REX is
25 reviewing its exhibit list and deposition designations to determine what can be eliminated,
26 particularly evidence that relates solely to NAR, without jeopardizing its ability to present its
27 damages case to the jury. REX also anticipates that the Court will impose time limitation on

the presentation of evidence and, once the Court makes its parameters known, REX will adjust its designations accordingly. Finally, the parties have not conferred regarding both questions for the venire and jury instructions because the Court indicated it would provide them to the parties for their comment and review in the first instance.

REX opposes a status conference in addition to the pre-trial conference which is scheduled for September 8th, 2023 because the issues that Zillow raises can be addressed at the pre-trial conference.

C. Trial Briefs

The parties seek the Court's guidance as to what would be helpful to the Court to address in the trial briefs, which are due September 1, 2023. *See* Dkt. 258.

D. Motion *In Limine* Reservation of Rights

Zillow's Position: Following this Court's August 16 order, Zillow promptly reached out to REX to discuss motions *in limine* related to REX's dismissed claims. Zillow filed a motion *in limine* on August 17 as required by the Court regarding certain of these issues but notes that other issues may warrant briefing if the parties cannot agree: (1) Any evidence regarding a now-rejected agreement between Zillow and NAR; (2) Any communications by NAR or MLSs, and not involving Zillow, regarding the no-commingling (or any other) NAR model or actual local MLS rule; and (3) Prevailing commission rates in the U.S. or elsewhere. Further, Zillow reserves the right to seek to exclude evidence and arguments regarding the Buyer Broker Commission Rule ("BBCR") pending the Court's ruling on Zillow's *Daubert* motion to exclude the testimony of David Evans.

REX's Position: REX opposes Zillow's "reservation of rights." The deadline for motions *in limine* has passed. REX responded promptly to any and all of Zillow's requests to meet and confer regarding motions *in limine* and did so as late as yesterday, August 17, 2023 with regard to an issue Zillow raised for the first time that morning. If Zillow had additional motions *in limine* that it wished to pursue, it could and should have sought REX's position and absent agreement, filed its motions prior to the deadline.

DATED: August 18, 2023

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**Pursuant to this Court's Electronic Filing Procedure III L, the electronic signatory has obtained approval from all other signatories.